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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 493.

FREDERICK SEYMOUR BARRINGTON, PLAINTIFF IN ERROR,

vs.

THE STATE OF MISSOURI.

Brief for Plaintiff in Error in Answer to Motions to Dismiss or Affirm and to Advance.

WM. G. JOHNSON,
Counsel for Plaintiff in Error.

LAW REPORTER PRINTING CO., WASHINGTON, D. C.

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The motion to dismiss in this case is based upon the two claims that no Federal question was presented and decided in the courts below (Motion, pp. 1 and 2), and because no assignment of errors was annexed to and returned with the writ of error (Motion, p. 2).

The motion to dismiss does not involve the consideration of the case upon its merits but merely presents the question whether this court has jurisdiction of the case; that is, did the plaintiff in error set up and claim any right or protection under the Federal Constitution which was denied to him in the State court.

The plaintiff in error set up and claimed that, under the Federal Constitution, as well as the constitution and laws of Missouri, he was entitled to a fair and impartial trial and that he was entitled to be protected in that

right from the effects of local bias and prejudice against him, through the instrumentalities provided for that purpose by the State laws regulating his trial. That the State court in refusing that protection denied to him the fundamental right to a fair trial, to which, under the Federal Constitution, he was entitled; and that, also, it thereby denied to him the equal protection of the laws.

The plaintiff in error also set up and claimed that, under the Federal Constitution, as well as under the constitution of Missouri, he could not be compelled to give testimony against himself, and that this exemption and protection were denied to him by the court in permitting to be given in evidence against him alleged extra-judicial admissions, extorted from him while under arrest, by police officers of the State.

The specific character of the objections made by the plaintiff in error in the courts below and of the facts upon which they are based are clearly set forth in the dissenting opinion of Judge Valliant (Rec., pp. 687–696), in which he points out the circumstances of local bias and prejudice preventing the plaintiff in error from securing a fair trial, and also the circumstances attending his alleged admissions and the manner in which they were presented to the jury.

In discussing the conditions of local bias and prejudice existing against the plaintiff in error, Judge Valliant says by way of introduction (Rec., p. 688):

> "There are many reasons why, in my opinion, this judgment should not be affirmed, and those reasons *all combine to establish one proposition—that is, that this man did not have a fair trial.* Every step in the case, from his arrest to his trial, was attended with dramatic scenes that evinced no care to guard from unjust imputation the man who, howsoever unsavory his reputation and howsoever strongly involved in apparently incriminating circumstances, might, in fact, still be

innocent and who was in law presumed to be innocent."

The judge then details the principal facts thus (Rec., p. 689):

"When the dead body supposed to have been that of McCann was found, suspicion rested on the defendant, and public interest in him was again aroused; *the newspapers took up the subject*, and defendant's past life and character, as indicating a man capable of such a crime, became their theme *and the overshadowing sensation for the time being.* He was arrested, subjected to what the State's witness called 'a course of sweating,' and lodged in jail. During his preliminary examination, which took place at the courthouse at Clayton, the county seat of St. Louis County, a witness states that whenever the ruling of the examining magistrate on a question was in favor of the State *the audience applauded.* While he was in jail awaiting his trial, *the managers of one of the public theatres in St. Louis caused to be prepared for the stage a sensational drama, to which was given the name 'The Desperate Lord Barrington,'* and which dealt in a highly melodramatic style with the supposed life and character of the defendant, showing him in the most despicable light and *professing to portray on the stage the murder for which the defendant was being held.* When this drama was advertised the defendant petitioned the court to have the parties who were purposing to put it on the stage cited for contempt, but the court denied the petition and the play went on. After it had been enacted and the prejudicial effect which it was liable to have on the defendant's cause was shown to the court, the defendant again applied to the court to have it stopped, but the court again refused and the play went on. Afterwards the defendant moved the court for a change of venue on the ground of the prejudice of the inhabitants of St. Louis County, and at the

hearing introduced the testimony of a large number of citizens of the county to sustain the charge of prejudice; he introduced also numerous articles published in the principal newspapers of the city calculated to create prejudice of the strongest kind against the defendant, and he introduced evidence of the character of the melodrama above mentioned, enacted on the stage of the theater. But the court denied the application for a change of venue."

Further commenting upon this phase of the case, Judge Valliant says (Rec., pp. 693–4):

"I come now to a consideration of what I consider the gravest error in the case; that is, the refusal of the court to grant a change of venue.

"It will be impossible in the space which I am willing to take in this opinion to give anything like a detailed summary of the evidence that was presented to the court in support of this application. A large number of respectable witnesses of St. Louis County testified that there was a prejudice in the minds of the people of that county against the defendant; but the strongest evidence was the production of the newspapers which circulated in the county and which moulded public opinion. *Every strong, influential newspaper in the city published, day after day, columns of the most damaging statements concerning the man. These professed to have discovered and brought to light events in his past history connecting him with the most atrocious crimes in Europe before he came to America, and the despoiling of at least two young women under fictitious marriages in this country; then they took up what was said to be the evidence in this cause, and showed the defendant in the light of a cruel murderer of his best friend; there could be, according to the newspapers, no doubt of his guilt.* To such a high point in the public mind was the subject brought that the managers of one of the prominent theatres in the city caused *a most thrilling melo-*

drama entitled 'The Desperate Lord Barrington' to be prepared and put upon the stage, in which *this defendant was the chief villain and McCann his latest victim.* The play was advertised in all the prominent newspapers and in flaming posters. In the posters it was described as 'The acme of sensational melodrama—A play filled with thrills, throbs, laughter, and tears—It quickens the pulse beats, excites emotions, and stirs the better nature of every auditor—A play in which virtue wins and the villains get all that is coming to them.' The chief actor in the play was, in theatrical parlance, 'made up' *to look like the defendant, and imitated his voice and manner. According to the play the defendant was guilty of murdering the real Lord Barrington before he came to America,* and besides marrying several women, committed another murder in this country before he landed in St. Louis. *The scene of the climax of the drama was made to represent the rock quarry near Bonfils, in St. Louis County, where the dead body was found, and there the defendant and McCann appeared.*

. . . . . .

"In matters of the kind we are now considering the newspapers, especially when they are all agreed, mould public opinion. When these newspapers, with their exciting reports of alleged discoveries of inculpating evidence, and the character of this extraordinary theatre performance, were laid before the court on the motion for a change of venue, there was no necessity to call witnesses to testify that there was a prejudice in the minds of the people of St. Louis County against this man. No case has ever come under my notice where the evidence on this subject was so overwhelming. The inhabitants of the county, if they possessed that abhorrence to crime that is felt in all enlightened communities, could not, when subjected to these influences, have failed to have conceived a strong prejudice against this defendant."

The details of these newspaper attacks and of this theatrical performance will be found fully set forth in the record (Rec., pp. 78–255; 263–272; 336–354; 405–418).

Applications were duly made to the court to suppress these theatrical representations (Rec., pp. 156, 405–418) and for a change of venue, but were refused by the court (Rec., pp. 411, 418, 419, 421).

With reference to the "course of sweating" above referred to, by which the police officers sought to extort a confession from the prisoner, then in their custody, Judge Valliant says (Rec., p. 691):

> "When this man was arrested he was taken to the office of the chief of detectives, and from 9 o'clock in the evening until 2 o'clock in the morning he was subjected to what the *witness for the State* called 'a course of sweating.'
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> "According to testimony in his behalf all the technical skill and ingenuity of the most experienced experts bore upon him to entrap him into saying something that would be evidence against himself. There was no threat—no promise—oh, no; in fact, the prisoner was expressly told that they would make no threat; they would make no promise; he was entirely free to answer or not as he might elect; yet free as he was, *the sweating process went on until at length his nerves gave way; he broke down and wept.* What he said on that occasion was given in evidence by the State, and the court in its instruction to the jury on that point said: 'What the defendant said *against himself*, if anything, *the law presumes to be true*, because said against himself. *What he said for himself you are not bound to believe*, because said in a statement or statements proved by the State, but you may believe it or disbelieve it, as is shown to be true or false, as shown by all the evidence in the case."
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> . . . . . .
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> "The jury could not have understood the instruction to mean anything else than that what

the prisoner said that might be construed as tending to incriminate himself was to be taken as gospel truth, while what he said which tends to exculpate him is to be received with caution and believed or disbelieved as the other evidence of the case might warrant."

The facts relating to this transaction are fully set forth in the record (Rec., pp. 425–490).

The constitution of Missouri, like the Federal Constitution, contains provisions designed to secure to a defendant, in a criminal case, a fair trial by an impartial jury, to protect him against being compelled to give testimony against himself, and to insure that no one shall be deprived of life, liberty or property without due process of law.

These provisions are as follows:

ARTICLE 2.

"Sec. 22. In criminal prosecutions the accused shall have the right to appear and defend in person or by counsel; to demand the nature and cause of the accusation; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf; and a speedy public trial by an impartial jury of the county.

"Sec. 23. That no person shall be compelled to testify against himself in a criminal cause."

"Sec. 30. That no person shall be deprived of life, liberty or property without due process of law."

The statutes of Missouri, designed to give to a defendant the means of securing a fair and impartial trial in cases where local prejudice will tend to defeat it, contain these provisions (Revised Statutes of Missouri, 1899).

"Sec. 2572. Any criminal cause pending in any Circuit Court may be removed, by the order of

such court or the judge thereof, to the Circuit Court of another county in the same circuit whenever it shall appear in the manner hereinafter provided that the minds of the inhabitants of the county in which the cause is pending are so prejudiced against the defendant that a fair trial can not be had therein."

"Sec. 2574. Whenever it shall appear in the manner hereinafter provided that the inhabitants of the entire circuit are so prejudiced against the defendant that a fair trial can not be had therein, the cause shall, by order of the court or judge thereof, be removed to another circuit, in which such prejudice is not alleged to exist.

"Sec. 2575. Such order of removal as specified in the two preceding sections, shall be made on the application of the defendant or where the defendant is under the age of 16 years, on the application of the parent or guardian of such defendant, or if such defendant has no parent or guardian then on the application of any respectable citizen of the county where the cause is at issue."

Notwithstanding these provisions of constitutional law, the fundamental right of the defendant to a fair trial and that the prejudice existing against him was so vehement that "every strong, influential newspaper in the city published, day after day, columns of the most damaging statements concerning the man," and that a theatre found the public taste and feeling such as to make it profitable to prepare and present a drama representing the defendant as guilty of the crime charged, as well as of others equally heinous, the court denied to the plaintiff in error the right to a fair trial and the means provided by law for securing it in refusing to stop the theatrical performance and in refusing the defendant a change of venue (Rec., pp. 411, 418–19, 422).

It is respectfully submitted that in order to give this court jurisdiction to review by writ of error the judg-

ment of the highest court of a State, it is not necessary that some specific provision of the Federal Constitution shall have been set up. By the decisions of this court there are some fundamental and natural rights which are protected by the Federal Constitution, though not in terms mentioned in that instrument.

Thus, in Caldwell *vs.* Texas, 137, U. S., 692, Mr. Chief Justice Fuller says (pp. 697–8):

> "By the Fourteenth Amendment the powers of the States in dealing with crime within their borders are not limited, but no State can deprive particular persons or classes of persons of equal and *impartial* justice under the law. Law, in its regular course of administration through courts of justice, is due process, and when secured by the law of the State, the constitutional requisition is satisfied. 2 Kent Comm., 13. And due process is so secured by laws operating on all alike, and not subjecting the individual to the *arbitrary* exercise of the *powers* of government, *unrestrained by the established principles of private right and distributive justice.* Bank of Columbia *vs.* Okely, 4 Wheat., 235, 244. The power of the State must be exerted *within the limits of those principles,* and its exertion can not be sustained when special, *partial* and arbitrary."

In Holden *vs.* Hardy, 169 U. S., 366, Mr. Justice Brown, says (pp. 389–90):

> "This court has never attempted to define with precision the words 'due process of law,' nor is it necessary to do so in this case. It is sufficient to say that *there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard,* as that no man shall be condemned in his person or property without due notice and an opportunity of being heard in his defense."

In Brown *v.* New Jersey, 175 U. S., 172, Mr. Justice Brown says (p. 175):

> "The State has full control over the procedure in its courts, both in civil and criminal cases, subject only to the *qualification* that such procedure must *not work a denial of fundamental rights* or conflict with specific and applicable provisions of the Federal Constitution."

It is respectfully submitted that among the "fundamental rights" and the "immutable principles of justice which inhere in the very idea of free government" none can be more important than the right of a defendant, on trial for his life or liberty, to have a fair and impartial trial and the benefit of all the instrumentalities of the law designed to secure that right; and such, it is submitted, have been the rulings of this court. Thus, in Carter *v.* Texas, 177 U. S., 442, this court said, speaking through Mr. Justice Gray (p. 477):

> "Whenever by any action of a State, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment of the Constitution of the United States."

So, in the recent case of Kentucky *vs.* Powers, 201 U. S., 1, the clear indications of the court are that if the course alleged to have been pursued in the previous trials shall be persisted in and conviction result, this court will have jurisdiction upon writ of error to review that judgment. Yet neither of these cases, nor those relied upon in Carter *vs* Texas, proceeds upon the theory that the Constitution gives to a defendant the right to have, upon the grand

jury which indicts or the petit jury which tries, persons of the African race or of the same political opinions and affiliations with the defendants. What those cases condemn is the local bias and prejudice which the acts complained of disclosed, through which discriminations are or may be made against the defendants, and whereby they may be deprived of the fundamental right to a fair and impartial trial.

So, also, the right of a defendant, in a criminal prosecution, to be exempt from the obligation to give testimony against himself, while specifically protected by the Constitution in the United States courts, is still a matter of fundamental right, not to be denied in any court.

Thus in the case of Bram *vs.* United States, 168 U. S., 532, Mr. Justice White says (pp. 544–5):

> "In Brown *vs.* Walker, 161 U. S., 591, 596, the court, speaking through Mr. Justice Brown, said:
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> 'The maxim *nemo tenetur seipsum accusare* had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons which has long obtained in the continental system, and, until the expulsion of the Stuarts from the British throne in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, was not uncommon even in England. . . . So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with tne impregnability of a constitutional enactment.'
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> There can be no doubt that *long prior to our independence* the doctrine that one accused of crime *could not be compelled to testify against himself* had reached its full development in the

> common law, was there considered *as resting on the law of nature*, and was embedded in that system as one of its great and distinguishing attributes."

It is respectfully submitted that the record shows that a Federal question is involved in the judgment sought to be reviewed—namely, the fundamental right of the defendant to a fair trial and to be exempt from giving testimony against himself.

The defendant in error also assigns as a reason for dismissal for want of jurisdiction that no Federal question was presented to the said Circuit Court of St. Louis County or to the Supreme Court of the State of Missouri for determination in said cause (Motion, p. 2); yet in the "statement" accompanying said motion (pp. 5–6) it is admitted that the plaintiff in error did raise these questions in both courts.

These constitutional objections of the plaintiff in error were regularly made as shown by the record (Rec., pp. 419, 422, 619, 629, 631, 697, 698).

It is submitted that, under the decisions of this court, the Federal question is not required to be raised in any special or formal manner.

In Murray *vs.* Charleston, 96 U. S., 432. This court said (p. 441):

> "The jurisdiction of this court over the judgments of the highest courts of the States is not to be avoided by the mere absence of express reference to some provision of the Federal Constitution. . . . The form and mode in which the Federal question is raised in the State court is of minor importance, if, in fact, it was raised and decided.
>
> "In questions relating to our jurisdiction, undue importance is often attributed to the inquiries whether the pleadings in the State court expressly assert a right under the Federal Consti-

> tution. The true test is not whether the record exhibits an express statement that a Federal question was presented, but whether such a question was decided, and decided adversely to the Federal right. Everywhere in our decisions it has been held that we may review the judgments of a State court when the determination or judgment of that court could not have been given without deciding upon a right or authority claimed to exist under the Constitution, laws, or treaties of the United States, and deciding against that right. Very little importance has been attached to the inquiry whether the Federal question was formally raised."

It is the effect of the judgment upon such rights of the party as are protected by the Federal Constitution which is to be considered. If the defendant objects to the action of the court as against his constitutional rights, and the court decide against him, then a Federal question is presented and the jurisdiction of this court attaches. If the action of the State court be erroneous, then it constitutes a violation by the State of the Fourteenth Amendment.

In Chicago, Burlington & Quincy R. R. *vs.* Chicago, 166 U. S., 226, this court, through Mr. Justice Harlan, says (pp. 234–5):

> "But a State may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law regard must be had to substance, not to form. This court, referring to the Fourteenth Amendment, has said: 'Can a State make anything due process of law which, by its own legislation, it chooses to declare such?

> To affirm this is to hold that the prohibition to the States is of no avail, or has no application where the invasion of private rights is effected under the forms of State legislation.' Davidson *vs.* New Orleans, 96 U. S., 97, 102. The same question could be propounded, and the same answer should be made, in reference to judicial proceedings inconsistent with the requirement of due process of law. If compensation for private property taken for public use is an essential element of due process of law as ordained by the Fourteenth Amendment, then the final judgment of a State court, under the authority of which the property is in fact taken, is to be deemed the act of the State within the meaning of that amendment."

In Carter *vs.* Texas, 177 U. S., 442, the court says (p. 477):

> "But the question whether a right or privilege, claimed under the Constitution or laws of the United States, was distinctly and sufficiently pleaded and brought to the notice of a State court, is itself a Federal question, in the decision of which this court, on writ of error, is not concluded by the view taken by the highest court of the State."

It is also assigned as ground for dismissal of the writ of error that no assignment of errors was returned with the writ of error (Motion, p. 2), and the case of Rowe *vs.* Phelps, 152 U. S., 87, is relied upon.

In that case there was no motion to dismiss, the case having been argued and submitted on the merits, and the writ of error was dismissed because there was no assignment of errors sent up with the record and no specification of the errors relied upon in the brief on the merits as required by the rule, and further because there was no such plain error not assigned or specified as called upon the court to exercise its option to review the questions involved.

It is settled by the rules, practice and decisions of this court that an assignment of errors made part of the brief for argument under rule 21 is sufficient.

In School District of Ackley *vs.* Hall, 106 U. S., 428–9, this court said:

> "A failure to annex to or return with a writ of error an assignment of errors, as required by sect. 997 of the Revised Statutes, is no ground for dismissal for want of jurisdiction. If an assignment is filed in accordance with the requirements of par. 4, rule 21, it will ordinarily be enough."

So also in Gumbel *vs.* Pitkin, 113 U. S., 546–7, the court says:

> "A motion is made to dismiss the writ of error in this case on the following grounds:
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> . . . . . .
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> "2. No assignment of errors was transmitted with the record, as required by the rules of the court and by § 997 Rev. Stat.
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> . . . . . .
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> "The second ground is met by the decision of this court in the case of the School District of Ackley *vs.* Hall, 106 U. S., 428, where it is said that a writ of error will not be dismissed for want of jurisdiction by reason of a failure to annex thereto or return therewith an assignment of errors pursuant to the requirements of § 997, Rev. Stat. Nor does rule 8 require a copy of assignment of errors in the transcript when no such assignment was filed in the court below."

Defendant in error also moves to affirm the judgment on the ground that the "question on which the jurisdiction depends is so frivolous as not to need further argument" (Motion, p. 17). It is respectfully submitted that if, as contended by plaintiff in error, a Federal question is presented, the facts that two of the judges of the supreme court of Missouri dissented from the judgment

Rec., p. 686) and that the chief justice of that court, who concurred in the judgment of affirmance, allowed the writ of error is sufficient answer to the suggestion that the question is frivolous.

The Motion to Advance.

A motion is also made to advance this cause in the event that the motion to dismiss be not granted. As the motion to advance was only noticed in time for submission on April 1, 1907, and as counsel is advised that this court will not hear arguments after April it is respectfully submitted that the case be not advanced for argument at this term, as the time would be insufficient for the proper preparation for argument.

It is respectfully submitted that the motions to dismiss or affirm should both be denied.

WM. G. JOHNSON,
Counsel for Plaintiff in Error.